NO. 21082

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MACHADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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# APPELLEE'S BRIEF

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APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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WM. MATTHEW BYRNE, JR.,
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# APPELLEE'S BRIEF

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## I

## JURISDICTIONAL STATEMENT

Appellant David Machado was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on April 6, 1966, in Case No. 36029-CD [C. T. 2]. 1/ The indictment charged a violation of Title 50 Appendix, United States Code §462, Universal Military Training and Service Act; Refusal to be inducted.

On May 23, 1966, appellant was arraigned and entered a plea of not guilty. He was represented by retained counsel at all stages of the proceedings. On June 7, 1966, the case was called for court trial before the Honorable Irving Hill, United States

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1/ "C. T." refers to Clerk's Transcript of Record.

District Judge. Trial commenced and appellant was found guilty on June 8, 1966. On June 28, 1966, appellant was sentenced to the custody of the United States Attorney General for a term of three years [C. T. 6]. Bond on appeal was set at $100.

Jurisdiction of the trial court was founded upon Title 50 Appendix, United States Code, §462 and Title 18, United States Code, §3231. This Court has jurisdiction pursuant to Title 28, United States Code, §1291, §1294.

## II

## STATUTES INVOLVED

Title 50 Appendix, United States Code, §462(a) provides in pertinent part as follows:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . ., or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . ., or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . ., shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment

for not more than five years or a fine of not more than $10,000, or by both. . . ."

Title 50 Appendix, United States Code §456(j) provides in pertinent part as follows:

" . . . Any person claiming exemption from combatant training and service because of . . . conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned. . . . If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. . . ."

Regulations

Title 32, Code of Federal Regulations §1631.7 provides in pertinent part as follows:

"(a) Each local board, upon receiving a Notice of

Call on Local Board . . . for a specified number of men to be delivered for induction . . . shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A . . . and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Certificate of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction. . . . Such registrants . . . shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date of this amended subparagraph and with whom they maintain a bona fide family relationship

in their homes, in the order of their dates of birth with the oldest being selected first. . . ."

## III

## STATEMENT OF FACTS

On October 14, 1958, at age 18, appellant registered with his local board (Ex. 2). [2/] On April 19, 1960, the local board received notice that appellant had moved to New York but planned to return to his old address in Los Angeles at the end of the year (Ex. 16). On December 14, 1960, however, appellant wrote the local board that he had left New York and was "touring Europe" stating that he could be "reached through [his] parents" at a given address (Ex. 17).

In October, 1961, appellant was sent a Classification Questionnaire at his parent's address, but this questionnaire was never completed and returned as required (Ex. 19-28). On November 9, 1961, appellant was classified as I-A, and on November 13, 1961, notice of said classification was mailed to him at the address on file with the local board. On April 11, 1963, the local board again mailed appellant a Classification Questionnaire, which was this time completed and returned (Ex. 4). No claim for exemption as a conscientious objector was asserted (Ex. 7).

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2/ "Ex" refers to Appellant's Selective Service File.

On April 18, 1963, appellant was ordered to report for his armed forces physical examination on May 3, 1963 (Ex. 33). Thereafter on October 15, 1963, the local board received notice that, after examination, appellant had been found fully acceptable for induction into the armed forces, and appellant was notified of this fact (Ex. 12, 38). On October 24, 1963, the local board received notice that the appellant was no longer a full-time student (Ex. 42). Consequently, on November 14, 1963, appellant was classified as I-A. Normally, the next step in his selective service processing would be an order to report for induction. Cf. 32 C.F.R. §1631.7(a), (a)(3). Within two weeks after the notice of the I-A classification had been mailed, however, appellant asserted "convictions against killing my fellow man" and was sent a Form 150, the Special Form for Conscientious Objector (Ex. 43). Appellant indicated that his conscientious objections to war had developed during childhood and been reinforced "during experiences abroad" (in late 1960 and 1961) (Ex. 17, 46). He stated in his Form 150 that he had not given public expression to his conscientious objector views (Ex. 46). At some time in the fall of 1963, however, he gave a speech entitled "Thou Shalt Not Kill" as part of a class in Basic Public Speaking at Los Angeles City College (Ex. 85).

Appellant was again classified I-A by the local board (Ex. 12), and was accorded the special appellate procedures required by Title 50 App. U.S.C. §456(j), i.e., an inquiry and hearing by the Department of Justice prior to action by the local appeal board on his claimed exemption (Ex. 72). The hearing officer of the Department

of Justice found that the appellant was not sincere (Ex. 73). The Department of Justice also concluded that appellant was insincere and recommended against granting a conscientious objector exemption (Ex. 75). The appeal board concurred in this recommendation, classifying the appellant as I-A on November 1, 1965 (Ex. 14). Notice of said classification was mailed to the petitioner on November 19, 1965 (Ex. 14). Thereafter, on December 7, 1965, appellant was ordered to report for induction on December 21, 1965 (Ex. 14). Appellant appeared on that day but did not submit to induction (Ex. 112-114).

## IV

## QUESTIONS RAISED ON APPEAL

I. Was there a basis in fact for denying appellant a conscientious objector exemption?

II. Was appellant accorded due process during his hearing before the hearing officer of the Department of Justice?

III. Should this Court review contentions not raised in the District Court?

V

## ARGUMENT

### A. THE FINDING OF INSINCERITY CONSTITUTES A BASIS IN FACT FOR REJECTING APPELLANT'S CONSCIENTIOUS OBJECTOR CLAIM.

Section 6(j) of Title I, Universal Military Training and Service Act, as amended, 50 App. U.S.C., §456(j) provides that a registrant denied classification as a conscientious objector by his local board, is entitled to a hearing and inquiry by the Department of Justice which then makes an advisory recommendation to the appeal board prior to a ruling on the registrant's claim for exemption. See supra, page 3.

Appellant was accorded such an inquiry and hearing pursuant to the above provision. The hearing officer found him not sincere (Ex. 73). The registrant never contradicted the summary of the Department of Justice inquiry (Ex. 73, 76-83). The Department of Justice recommended that the registrant's conscientious objector claim be not sustained on the sole ground that the registrant was not sincere in that claim, on the basis of its inquiry, the hearing and the facts appearing in appellant's Selective Service File. 3/

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3/ This case, therefore, differs from that of the registrant Jacobson. See United States v. Seeger, 380 U.S. 163, 168 (1965) (Consolidated Opinion). There, the recommendation of the Department of Justice regarding Jacobson was based both on insincerity and the absence of an appropriate belief in relation to a Supreme Being. There is no suggestion in the present record, we submit, that the appeal board may have relied upon an improper standard in rejecting the appellant's conscientious objector claim.

Witmer v. United States, 348 U.S. 375 (1955), establishes that insincerity is a ground for denying a conscientious objector exemption and that a finding of insincerity can be based on "any fact which casts doubt on the veracity of the registrant". 4/ 348 U.S. at pp. 381-382. The question is whether the registrant's beliefs are "truly held". See United States v. Seeger, 380 U.S. 163, 185 (1965).

In the instant case, the finding of insincerity was supported by:

1. The appellant's demeanor and credibility (Ex. 73);

2. The imminence of induction at the time the claim was asserted (Ex. 74);

3. The lack of public expression supporting appellant's views (Ex. 46, 74);

4. Appellant's delay in asserting the claim (Ex. 74);

To this can be added:

5. The fact that appellant asserted the claim immediately after losing his status as a student for deferment purposes, and that

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4/ The Supreme Court distinguished Dickinson v. United States, 346 U.S. 389 (1953), stating that, in the case of a conscientious objector claim, "the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form". 348 U.S., at p. 381. Conscientious objector status is, therefore, properly denied where the record is susceptible of some inference of insincerity. In Dickinson, the registrant had presented undisputed, objective facts showing, prima facie, that he was a "regular or duly ordained minister of religion". The local board was therefore required to rebut these objective facts with some evidence "incompatible with the registrant's proof of exemption". 346 U.S., at p. 396.

he continued to consider seeking student deferment (Ex. 42, 58) [R. T. 109]. 5/

6. The fact that appellant failed to assert the claim on filing his Classification Questionnaire in April 1963, when the issue was raised in Part VIII of the form, although this was only six months prior to the time the claim was asserted (Ex. 4, 7).

In Witmer, the hearing officer found the registrant sincere, contrary to the appeal board. Even without a finding of insincerity based on demeanor, the Supreme Court held that there were "indications which, while possibly insignificant standing alone, in this context help support the finding of insincerity". 348 U. S., at p. 383. The Supreme Court stressed that the petitioner failed "to adduce evidence of any prior expression of his allegedly deeply felt religious convictions against participation in war". 348 U. S., at p. 383. It was also noted that insincerity could be inferred from the fact that the claim was only advanced after other requests for deferment had been denied, and also from inconsistent statements of the registrant.

Additional factors supporting a finding of insincerity are stressed in United States v. Corliss, 280 F. 2d 808 (2nd Cir. 1960). This consolidated opinion affirmed the conviction of Fred August Heise, the Court noting that Heise's initial registration questionnaire did not set forth a conscientious objector claim. 6/ The

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5/ "R. T." refers to Reporter's Transcript.

6/ Further, as in Witmer, the registrant sought deferment on other grounds, and had failed to express his views publicly.

Court also relied upon the fact that the "hearing officer 'was not favorably impressed as to the registrant's sincerity in making his claim' ". Thus, unlike in Witmer, an assessment of the registrant's credibility served to support a finding of insincerity.

In affirming the conviction of the registrant Corliss, the Court also stressed the hearing officer's finding of insincerity based upon his observation of the registrant's demeanor. Citing Witmer, supra, in recognition of the fact that the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting on religious grounds to participation in war in any form, the Court held that:

> "It would seem to follow that although denial of exemption may be and often is supported by objective facts inconsistent with the claim, denial may also rest on a disbelief in the sincerity of the claim, unaccompanied by any inconsistent facts, provided the disbelief is honest and rational."
>
> (Emphasis added.) 280 F. 2d at p. 814.

In Corliss' case, the court affirmed his conviction even though Corliss was associated with a religious sect having as one of its tenets opposition to war in any form; although Corliss' association with this religious sect long preceded his liability for military service; and although there was no evidence of conduct inconsistent with his claim of sympathy with that sect. In the instant case, we submit that there is more to support an inference of insincerity that the bare finding based on demeanor in the registrant Corliss'

case.

We submit that Annett v. United States, 205 F. 2d 689 (10th Cir. 1953), cited in Appellant's Opening Brief, p. 12, is not in conflict with Corliss, supra. The language quoted in appellant's brief, p. 12, indicates only that insincerity can not be based upon the opinion or conclusion of a witness. This is different from a finding of insincerity made by a judicial officer based on demeanor evidence. In Annett, a finding of insincerity by the hearing officer was in fact reversed, but it was not based on a credability finding supported by personal observation. We submit that the finding of insincerity in Annett would not stand up under the test required in Corliss, supra, i. e. that the finding be honest and rational, because it was biased and arbitrary on its face, and because it relied on improper opinion evidence.

We submit conversely that the finding of insincerity in the instant case does stand up under the Corliss test. There is nothing in the present record to indicate that the finding of the Hearing Officer was dishonest, improperly motivated, or irrational.

There are also incongruities in the registrant's statements and conduct which cast doubt upon his sincerity. The registrant stated that he was trained in the basis for his beliefs by his parents from earliest childhood, and that his experiences abroad had reinforced them (Ex. 46). Yet the registrant told the hearing officer that he began to think about his values and attitudes at the age of 19, associating the event with the arrival of his first draft notice (Ex. 73).

Whenever his ideas began to form, it was still not until the fall of 1963 that registrant chose to assert that he could not take part in war (Ex. 45). This was so even though the experiences abroad which had ostensibly reinforced his beliefs had taken place in 1960 and 1961 (Ex. 17, 46). When the claim was asserted his induction was imminent. Under these circumstances, the appeal board was not bound to credit his beliefs. Campbell v. United States, 221 F. 2d 454 (4th Cir. 1955). 7/

Under all these circumstances, we submit that enough of an inference of insincerity arises to provide a basis in fact for denying a conscientious objector exemption, and for classifying appellants as I-A (available for military service). Courts have uniformly refused to interfere with a registrant's classification as I-A unless it was first found that the local board lacked a basis in fact for the classification or that the local board acted arbitrarily and capriciously to the degree that the registrant was denied due process.

Witmer v. United States, supra;

Dickinson v. United States, supra;

Estep v. United States, 327 U. S. 114, 122 (1956);

Cox v. United States, 332 U. S. 442, 448 (1947);

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7/ When appellant asserted his claim, he had been found physically acceptable for service (Ex. 12, 38); he had been classified as I-A (Ex. 12); and he had just lost his qualification for a student deferment (Ex. 42). We submit that at his then age of 23, his induction must be, and must have been, considered as imminent. Cf. 32 CFR §1631. 7(a), (a)(3).

Rogers v. United States, 263 F. 2d 283, 285 (9th Cir. 1959).

We submit that the present record does not support such a finding of arbitrainess or lack of basis in fact.

## B. APPELLANT WAS ACCORDED A FAIR ADMINISTRATIVE HEARING.

During the processing of the appellant's conscientious objector claim by the Selective Service System, he was given a hearing before a hearing officer of the Department of Justice, referred to in Argument A, supra. Appellant appeared at the hearing with two persons, his father and a Richard Brooks [R. T. 49]. His father was present with him during the interview with the Hearing Officer [R. T. 51], and was allowed to speak on his behalf [R. T. 52-53]. Appellant made no request that Richard Brooks make any statement [R. T. 60-61].

The Hearing Officer testified at the trial that in the approximately 50 instances in which he had acted as a hearing examiner in such cases, it was never his policy to limit the number of witnesses who might appear on behalf of a Selective Service registrant, explaining that he only restricted to one the number of witnesses who might accompany the registrant in the hearing room at one time [R. T. 82, 84]. The trial court specifically credited this testimony, finding as a fact that the persons accompanying appellant were told that only one witness at a time was permitted

in the hearing room, not that only one witness was permitted to testify on behalf of the appellant [R. T. 132].

In any case, the refusal of the hearing officer to hear a proffered witness, would not be a violation of the registrant's constitutional or statutory rights according to Uffelman v. United States, 230 F. 2d 297, 303 (9th Cir. 1956). See 32 C. F. R. §1624. 1(b).

## C. CONTENTIONS NOT RAISED DURING TRIAL SHOULD NOT BE REVIEWED ON APPEAL.

Appellant was ordered to report for induction on December 21, 1951. He reported but refused to submit to induction (Ex. 112-114). No testimony was offered at trial regarding what took place at the induction station, and no issue was raised by the appellant during trial regarding any action taken there which allegedly deprived him of due process.

The Selective Service file contains several documents relating to appellant's induction processing (Ex. 115-146). These documents include an Armed Forces Security Questionnaire, DD Form 98, executed by the appellant on May 3, 1963. This document bears a stamp with signature blanks to be executed to verify that the registrant has reviewed the contents of this form at the time of induction (Ex. 141). The blanks in this stamp are not filled in. Since appellant did not contend at trial that he was deprived of an opportunity to review the questionnaire, we have no way of

establishing the surrounding facts, including for example, the specific opportunity to execute the form, and deliberate waiver. Furthermore, appellant does not claim that he was prejudiced by the absence of a re-executed DD Form 98 in his file. Cf. United States v. Feuer. 8/

Appellant was represented by competent counsel at trial. He should not be allowed to raise for the first time on appeal an abstract issue which cannot fully be analyzed in terms of the Selective Service File. In Elder v. United States, 202 F. 2d 465 (9th Cir. 1953), a Selective Service case, this Court approved the general rule that contentions not raised in the District Court will not be considered on appeal, making an exception only because the same contention, properly raised, had been upheld by another Circuit. The facts of record, however, clearly supported the contention raised for the first time on appeal in Elder, supra. There the appellant claimed prejudice from the fact that an F. B. I. report regarding his belief as a conscientious objector was not placed in his Selective Service File. We submit that in the instant case, there is no reason to depart from the general rule stated in Elder. Here, the appellant cites no reported case which has upheld his contention. Furthermore, all the facts bearing on the issue now raised were not developed at trial.

The same argument applies to the appellant's claim that

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8/ This unreported case is cited in appellant's brief at p. 25 and a part of the court's remarks are quoted. The existing partial transcript of the court's remarks was provided to appellee by the court reporter, and these remarks are set forth in Appendix "A".

he was not physically re-examined on the day he reported for induction. The Selective Service File indicates that forms for appellant's physical re-examination were available at the induction station. These, however, were not filled out. Instead the words "refused induction" appear on one page (Ex. 116). Again the reason why these forms were left blank does not clearly appear from the file. If the appellant is allowed to raise this issue for the first time on appeal, he deprives the appellee of chance to explain why these documents were left blank and to establish any waiver.

Since neither contention was raised at trial, neither should be reviewed on appeal. Robbins v. United States, 345 F. 2d 930 (9th Cir. 1965). This Court, as it held in Robbins, is entitled to full development of relevant facts at the trial, and findings of the District Court on any disputed facts, before being called upon to review questions on appeal.

See also:

United States v. Miller, 316 F. 2d 81, 83 (8th Cir. 1963), cert. den. 375 U. S. 935;

Tyree v. United States, 351 F. 2d 611-612 (5th Cir. 1965), cert. den. 385 U. S. 871;

Cf. Ramirez v. United States, 294 F. 2d 277, 283 (9th Cir. 1961);

Grant v. United States, 291 F. 2d 746, 748 (9th Cir. 1961), cert. den. 368 U. S. 999.

In any case, the Court we submit should require some showing in the record of prejudice, or, at least the strong

suggestion of prejudice, before allowing appellant to prevail on what we submit are technical procedural objections.

Cf. United States v. Lawson, 337 F. 2d 800, 812 (3rd Cir. 1964), cert. den. 380 U. S. 919; United States v. Manns, 232 F. 2d 709 (7th Cir. 1956).

This is especially so with respect to appellant's claim that he was not physically re-examined as required, since a duty is placed upon a prospective inductee to inform the local board of any change in his physical condition which occurs after his last examination. See Johnson v. United States, 285 F. 2d 700, 702 (9th Cir. 1960). This is specifically required of the registrant by 32 C. F. R. §1641. 7. Prior physical examinations in 1963 and 1964 found him fit (Ex. 124, 126). There is nothing akin to entrapment, i. e. suggesting that Army physicians believed him unfit and decided to pass him anyway. Cf. Feuer, supra.

On the entire record, we submit there is no showing that petitioner has suffered treatment amounting to a deprivation of due process.

## VI

## CONCLUSION

For the reasons stated, the decision of the trial court should be affirmed.

Respectfully submitted,

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William P. Lamb

WILLIAM P. LAMB

# APPENDIX "A"

LOS ANGELES, CALIFORNIA; FRIDAY, MAY 24, 1957;
1:30 O'CLOCK P. M.

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* * * * * *

THE COURT: I have given a great deal of thought to this, Mr. Duncan, over the recess.

In view of the material appearing at page 124 and page 130 of the Selective Service file which indicates that some people thought of this defendant as being at least pro-Communist in his leanings, it looks to me as if someone may have just skipped the Loyalty Certificate. I don't know for what reason. It could be in view of this defendant's prior record that they didn't want to give him an opportunity to take it for fear he might not qualify. If he couldn't qualify he couldn't commit the felony with which he is here charged. And they knew he would refuse because he previously refused to report for induction.

MR. DUNCAN: The law doesn't require a vain act, your Honor.

THE COURT: Well, it seems to me that the Army should be required to show a waiver. Of course, I may be straining to make a legal proposition out of what is really an ethical one, but I would never permit a conviction against this defendant to stand in the face of this record.

The Army would have to swallow its regulation or comply

with it. They can't have their cake and eat it, too. They get caught in their own entanglement of the regulations. They won't take a man who is a Communist or who belongs to certain organizations even to do the menial work of the Army. They won't take people with criminal records to do the menial work of the Army. So it is fast becoming set up to the point where only the people who have unblemished records, the flower of the youth, so to speak, can have the "privilege" of doing the menial work of a buck private in the Army.

And while I don't depreciate the fact that people should look upon the privilege of serving the country as a privilege, I don't think that is the popular notion of this Selective Service Act today in peacetime.

It seems to me that if the Army wants to convict this man they can give him another notice to report for induction; if they either get this regulation out of the way somehow or certify he complies, or give him a chance to comply -- give him a chance to flunk it, so to speak.

This is almost like unto -- ethically at least -- a registrant with his record who has a vision that just doesn't quite meet the Army requirements, and the doctor says, "Well, we will pass him anyhow because he will refuse to be inducted and they will send him to prison for committing a felony." There is too much that is incongruous about that. It is too much like the Communists themselves would do, if you please, in the language of the street, to set a man up to convict him of a felony.

MR. DUNCAN: Your Honor, there was no evidence offered whatsoever that the Loyalty Oath or the waiver actually had anything to do with his refusal to be inducted.

THE COURT: No. Why didn't they give it to him then? The regulations say that every man shall have it. Why didn't they give him a chance to flunk it?

If he had failed the loyalty test then he couldn't have committed this felony, could he?

MR. DUNCAN: How has the irregularity damaged him in any way?

THE COURT: Well, it is akin to unlawful entrapment. Morally it is akin to unlawful entrapment, as I view it. You are going to force a man into a position where you know he is going to commit a felony; whereas if you let him go this other way he wouldn't.

MR. DUNCAN: I don't see how it is akin to entrapment at all, your Honor.

THE COURT: Well, I said "morally." I didn't say "legally," here.

MR. DUNCAN: Here are two procedural requirements. Nobody would argue that they were non-existent. No such regulations exist that the defendant had been denied any right. So I fail to see how the mere irregular performance or failure to perform those regulatory requirements can constitute a denial of due process as far as he is concerned.

THE COURT: Well, Mr. Duncan, if what appears in this

file didn't appear in this file it might appear differently to me. But I see the undertone here, or the overtone whichever you wish to characterize it, the thought that this man is a Communist; that he cannot pass that loyalty test. And if he didn't pass it he couldn't have committed the felony with which he is charged here, could he? He couldn't have committed it, could he?

MR. DUNCAN: Your Honor, the people at the induction station didn't have access to this Selective Service file.

THE COURT: I don't know who knew what, but what I am saying is that I would not permit a conviction of this man to stand on this kind of a record. I wouldn't be a party to it.

It may be all coincidence. I am not suggesting that it is anything but coincidence. But even on coincidence -- the cruelest pain that a human being can suffer is a pain of injustice, and to be forced by prior knowledge into committing a felony is something we shouldn't tolerate. To be forced, by removing one of the cogs of the administrative machinery, if you please, to appear that that might stop him from committing the felony. I am not suggesting it was done premeditatively, but on the record it is susceptible of that interpretation. And this man has been in the books. I read the case this morning. In fact, you cited it to me the other day in another case. The Foyer[sic] case. I didn't connect the two but you cited it to me on that Selective Service case on this question of change of classification. I didn't recognize it at the time. I didn't connect it with this defendant.

So he is well known in Selective Service circles, I can see

that, in this community. This file indicates that. He has been sent to prison once, and he may go again. I have no hesitancy in sending a registrant who refuses to obey the law to prison. I send them to prison all the time; too many of them, unfortunately.

But if the Army is going to have regulations like this they should either apply it to this man or put in the record why they don't before I would be a party to convicting him of a felony under these circumstances.

So I shall hold that there is no evidence that the regulation was waived; that the regulation, according to Army's own statement, is a condition precedent to qualification for induction.

MR. DUNCAN: Which regulation are you referring to, your Honor?

THE COURT: I am referring to the Loyalty Certificate regulation, DD Form 98, Section 5, page 60, Regulation No. 31, especially paragraphs (d) and (g).

I will ask the reporter to copy those into the record at this point. Will you make it available to him so that he may copy it into the record?

MR. DUNCAN: I might point out, your Honor, that this regulation is not exactly applicable as to the time of this offense. I will stipulate that there was essentially the same regulation in effect at this time.

THE COURT: Will you so stipulate, Mr. Marshall?

MR. MARSHALL: Yes, your Honor.

(31(d). One Loyalty Certificate is required of each

individual, except registrants classified as 1-0 (Conscientious Objectors available for civilian work contributing to the maintenance of the national health, safety or interest) who are exempt from the requirement to accomplish the Loyalty Certificate.

(g) A registrant who qualifies or refuses to accomplish the DD Form 98 in its entirety (re paragraph 2(i) and (j), AR604-10) or who discloses significant derogatory information with respect to his background, or invokes constitutional privileges, and registrants admitting current membership in the Communist Party (known Communists) and registrants for whom credible derogatory information has been received from a reliable source indicating Communist Party membership) (alleged Communists) as defined in Paragraph 2(e) and (f) AR604-10, will not be inducted into the Armed Forces pending completion of a thorough investigation.)

MR. DUNCAN: Then, your Honor, you feel that both regulations as to the Loyalty Certificate, as well as the Civil Defense waiver are --

THE COURT: Well, the Civil Defense waiver, I don't have that regulation before me. What does it provide?

MR. DUNCAN: It is a provision, your Honor, that the Army must waive the prior civil offense of the registrant prior to induction. I thought that was in the regulation that I gave your Honor.

THE COURT: It may have been. But I didn't get past this other one.

MR. MARSHALL: You didn't need to get past it.

THE COURT: You see, it is easier to find a waiver of that because that requires an affirmative act to stop the man, doesn't it? It requires affirmative acts of the Army to stop him.

But here this regulation with respect to the Loyalty Certificate requires an affirmative act of the registrant himself. It's like passing the examination. It's a test. They call it a test, a loyalty test. He has to pass that in order to be eligible.

And this record is susceptible to the interpretation that someone said, "He can't pass it. He won't pass it. So he won't be eligible for induction, so he won't commit the offense. He will refuse to be inducted, in any event, so let's offer it to him and let him refuse and let him be convicted again."

I want to make it clear that I am not suggesting that that is what in fact happened. But when the record is susceptible of that interpretation, it seems to me highly unjust and highly immoral to base a conviction upon such a record.

If there is nothing further, gentlemen, we will summon the jury and I will vacate the order denying the motion for a judgment of acquittal and grant a judgment of acquittal.

I should think in all of these cases you would be prepared to prove the waiver. The waiver should show in the file. Of course, if it is in the registrant's file that makes it easy to prove.

MR. DUNCAN: Well, as your Honor knows, this is a point of first impression. It hasn't been litigated before to my knowledge.

THE COURT: It is all new to me. I didn't know there was such a regulation. I knew there was a regulation with respect to civil offenses, but I never knew there was a regulation requiring a man to pass a loyalty test to be inducted into the Army.

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